

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERTO CARRASCO-SALAZAR,

Plaintiff,

v.

OPINION & ORDER

13-cv-011-wmc

U.S. BOP MEDICAL STAFF, MR.
FAERDAY, DR. REED, P.A. SPAHN,
ADMINISTRATOR LOPEZ, DR.
GUPTA, and P.A. RITTER,

Defendants.

In this proposed civil action for monetary and injunctive relief brought pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), plaintiff Roberto Carrasco-Salazar alleges deliberate indifference to his medical needs on the part of various employees at Oxford Federal Correctional Institution. Carrasco-Salazar is eligible to proceed *in forma pauperis* and has made an initial partial payment toward the full filing fee. *See* 28 U.S.C. § 1915(b)(1). Because Carrasco-Salazar is incarcerated, the court must also screen the complaint as required by the Prison Litigation Reform Act (“PLRA”). For reasons set forth below, the court will grant Carrasco-Salazar leave to proceed with his claim that the individual defendants he identifies acted with deliberate indifference to his serious medical needs but will dismiss the claim against the “U.S. BOP Medical Staff.”

ALLEGATIONS OF FACT

In addressing a *pro se* litigant’s pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the purposes of this order, the court accepts the plaintiff’s well-pled allegations as true and assumes the following facts:

Plaintiff Roberto Carrasco-Salazar has resided at Oxford Federal Correctional Institution since 2010. Mr. Lopez is the Administrator at Oxford's medical clinic. The remaining defendants are allegedly members of the medical staff at that clinic, though their specific roles are not identified.

Carrasco-Salazar has gone to medical staff at Oxford numerous times regarding his nasal passages, which he alleges are completely blocked due to his nose being smashed in and broken. As a result, Carrasco-Salazar claims to be unable to breathe, unable to sleep, and suffering from "major headaches" and nosebleeds. He further alleges that "each one of the [named defendants] has seen [his] problem," and that his condition has not improved despite purchasing decongestant allergy medication as directed by staff. Carrasco-Salazar asks the court for injunctive relief to repair his nose, as well as for \$25,000 in damages for pain and suffering.

OPINION

Carrasco-Salazar's allegation is that members of the prison staff have been deliberately indifferent to his blocked nasal passages, in violation of the Eighth Amendment. In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (citing *Bivens*, 403 U.S. 388). In *Carlson v. Green*, 446 U.S. 14 (1980), the Court affirmed the application of the core holding of *Bivens* in the Eighth Amendment context.

The Eighth Amendment affords prisoners a constitutional right to medical care. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97,

103 (1976)). Accordingly, a correctional officer's or medical worker's deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment. *Snipes*, 95 F.3d at 590. "Deliberate indifference" means that defendants must have been aware that plaintiff would be at a substantial risk of serious harm but that they disregarded the risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). A medical need may be "serious" if it: (1) is life-threatening, carries risks of permanent serious impairment if left untreated, or results in needless pain and suffering when treatment is withheld, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997); (2) "significantly affects an individual's daily activities," *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (citation omitted); (3) is "sufficiently serious or painful to make the refusal of assistance uncivilized," *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996); or (4) otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer*, 511 U.S. at 828.

Taken as true, Carrasco-Salazar has alleged sufficient facts about his nasal problems to support a claim of deliberate indifference to a serious medical need, at least at the screening stage. In particular, Carrasco-Salazar alleges that he cannot breathe through his nose, which both interferes with his ability to sleep and causes "major" headaches and nosebleeds. If these allegations are true, a court could find Carrasco-Salazar's blocked nasal passages interfere with his daily activities and are causing him needless pain and suffering. Carrasco-Salazar also alleges sufficient facts at the screening stage to allow the court to infer that the individual defendants knew of his need for treatment but refused to authorize it. Though he does not identify who the individual defendants are, Carrasco-Salazar also alleges that they work at Oxford's medical clinic and that all of them were aware of his

problems with his nose. Finally, Carrasco-Salazar includes documentation indicating that he has sought an operation to repair his blocked nasal passages, which defendants have denied, allowing the court to infer that individual medical staff members have failed to take reasonable measures to abate his serious medical need.

While permitting plaintiff to proceed against the individual defendants, the court will dismiss “U.S. BOP Medical Staff” as a defendant. Claims brought pursuant to *Bivens* must be brought against individuals personally responsible for the constitutional violation. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Vicarious liability is, therefore, unavailable in a *Bivens* suit. *Id.* The Bureau of Prisons as a body is not responsible for the actions of the individual defendants named in Carrasco-Salazar’s complaint, at least absent general policy and procedures mandating or adopting those actions. Accordingly, only Carrasco-Salazar’s allegations against the individual defendants satisfy the court’s lower standards for screening.

To ultimately prevail, Carrasco-Salazar will need to be prepared to come forward with *admissible* evidence permitting a reasonable trier of fact to conclude that the remaining defendants acted with deliberate indifference to his serious medical need. This is a much higher standard. Inadvertent error, negligence and gross negligence are insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). “Nor does mere disagreement as to the proper medical treatment support a claim of an [E]ighth [A]mendment violation.” *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987). Carrasco-Salazar, going forward, will need to *prove* that (1) his blocked nasal passages constituted a serious medical need; (2) each defendant he identified knew his condition was serious and required treatment or caused serious pain and suffering; and (3)

each defendant deliberately ignored his need for treatment. All of these things might very well require Carrasco-Salazar to provide credible expert testimony from a physician.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Roberto Carrasco-Salazar is GRANTED leave to proceed on his claim that individual defendants Faerday, Reed, Spahn, Lopez, Gupta and Ritter subjected him to cruel and unusual punishment under the Eighth Amendment by acting with deliberate indifference to his serious medical need.
- 2) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.
- 3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendant's attorney.
- 4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 23rd day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge